UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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AARON KOHN,

Plaintiff,

-against-

UNIQUE TRUCKERS, RIGGERS & MILLWRIGHTS, INC.,

MEMORANDUM AND ORDER
98-CV-3484

Defendant.

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UNIQUE TRUCKERS, RIGGERS & MILLWRIGHTS, INC.,

Third-Party Plaintiff,

-against-

SHELBY DYEING and FINISHING COMPANY, INC. and ACTION LIGHT and POWER, INC.,

Third-Party Defendants.

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GLASSER, United States District Judge:

Having removed this slip-and-fall action to federal court, third-party defendant Shelby Dyeing and Finishing, Inc. ("Shelby") now moves to dismiss the third-party complaint for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2) or, in the alternative, to transfer this action, pursuant to 28 U.S.C. § 157(b)(5) and 28 U.S.C. § 1412, to the United States District Court for the Western District of North Carolina. In addition, Aaron Kohn, the plaintiff in this action,

moves to (1) dismiss the third-party complaint against Shelby, pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6), (2) sever the third-party action from the main action pursuant to Fed. R. Civ. P. 14(a) and 42(b), (3) remand the action to state court and (4) strike the answer of defendant Unique Truckers, Riggers & Millwrights, Inc. ("Unique") because of failure to comply with a discovery request or, in the alternative, compel compliance with that request. For the following reasons, both motions are granted, the third-party action against Shelby transferred to the Western District of North Carolina and the principal action remanded to state court.

FACTS

Plaintiff Aaron Kohn alleges that he was injured while at the Shelby premises on or about May 7, 1990 "for the purpose of disconnecting wiring on machinery and/or equipment printing press" and that this injury resulted from the negligence of Unique in removing or disconnecting a printing press. Dellinger Aff., Ex. D (Verified Complaint), ¶¶ 11-13. These allegations were contained in a Summons and Verified Complaint filed on November 10, 1992 in the Supreme Court of the State of New York, Kings County. Dellinger Aff., Ex. D.

Earlier, on June 22, 1992 Shelby had filed a Voluntary Petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of North Carolina, Shelby Division. On April 13, 1993 the Bankruptcy Court entered an Order Confirming Plan, which confirmed Shelby's First Amended Plan of Reorganization. On the following day, the Bankruptcy Court closed the case. Dellinger Aff., ¶ 2.

On or about April 9, 1998 Unique served Shelby with a Third Party Summons and Complaint, alleging that Shelby will be ultimately responsible for any liability imposed in the underlying action.[1] Shelby then moved in the Bankruptcy Court to

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[1] The Third Party Complaint states several causes of action, to wit: (1) that any injury suffered by the plaintiff was due to the negligence of Shelby, (2) that Shelby agreed to indemnify and hold harmless Unique for any work done on its behalf by Unique, (3) that Shelby breached an agreement with Unique and that Shelby is therefore responsible for any liability imposed upon Unique, (4) that Shelby and Unique had entered into an agency relationship and that Shelby, as the principal, was liable for any liability imposed upon Unique, (5) that as plaintiff's employer, Shelby was responsible under New York Labor Law to provide "adequate protection and a safe place to work" and that, having failed to do so, Shelby is now liable for the resultant injuries, (6) that

reopen its case "so that the Bankruptcy Court could rule on the allowance or disallowance of the claims set forth in the third-party complaint. Dellinger Aff., ¶ 3. By order dated May 5, 1998 the Bankruptcy Court reopened the case "for the sole purpose of [the Bankruptcy Court's] adjudication of the claims against the Debtor and other parties raised" in this action. Dellinger Aff., ¶ 3; Ex. C. Shelby thereupon removed this action pursuant to 28 U.S.C. §§ 1441(a) and 1452(a) and Bankruptcy Rule 9027.[2]

Shelby failed to procure insurance that would have covered the injuries alleged by plaintiff and would have named Unique as an insured.

[2] 28 U.S.C. § 1441(a) provides, in pertinent part, that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. § 1452(a) provides that "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under 1334 of this title." 28 U.S.C. § 1334, which is referenced in the above section, sets forth the jurisdiction of the district courts in bankruptcy cases and proceedings and authorizes the district court to abstain

Dellinger Aff., ¶ 3.

DISCUSSION

A. Standard for 12(b)(2) Motion

On a Fed. R. Civ. P. 12(b)(2) motion, third-party plaintiff Unique bears the burden of showing that the Court has jurisdiction over Shelby. *See* Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996). The extent of that burden depends upon the posture of the case. "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith . . . legally sufficient allegations of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, 902 F.2d 194, 197 (2d Cir. 1990). "At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations." Id. "In the absence of an evidentiary hearing on the jurisdictional allegations, or at trial on the merits, all pleadings and affidavits are construed in the light most favorable to plaintiff, and where doubts exist,

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from exercising such jurisdiction under particular circumstances.

Bankruptcy Rule 9027 sets forth the rules for removal in bankruptcy proceedings.

they are resolved in the plaintiff's favor." Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985).

B. Personal Jurisdiction over Shelby

In the third-party complaint Unique alleges that Shelby is (1) a domestic corporation, (2) a foreign corporation doing business in New York, (3) a foreign corporation transacting business in New York or otherwise subject to long-arm jurisdiction. Shelby, however, avers that it is incorporated in South Carolina and has its principal place of business in North Carolina and that it "maintains no offices, owns no property, maintains no telephone listing, does no advertising, does not derive substantial revenues, and is not qualified to do business in New York." Dellinger Aff., ¶ 5.

In its responding papers, Unique does not contest these averments, but instead argues that it has jurisdiction over Shelby pursuant to C.P.L.R. § 302(a)(3), which allows for the exercise of jurisdiction, under certain circumstances, over a non-domiciliary who "commits a tortious act within the state causing injury to person or property within the state." In addition, Unique argues that it has jurisdiction over Shelby pursuant to C.P.L.R. § 302(a)(1), which provides that "[a]s to a cause of action arising from any of the acts enumerated in this

section, a court may exercise personal jurisdiction over any non-domiciliary, . . . who . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." These provisions are discussed in turn below.

1. C.P.L.R. § 302(a)(3)

To avail itself of § 302(a)(3), Unique must, *inter alia*, show that Shelby "committ[ed] a tortious act without the state causing injury to person or property within the state." C.P.L.R. § 302(a)(3). Mere residence in New York is insufficient to convey jurisdiction under these circumstances. As the United States Court of Appeals for the Second Circuit recently noted, "[a]n injury . . . does not occur within the state simply because the plaintiff is a resident." Mareno v. Rowe, 910 F.2d 1043, 1046 (2d Cir. 1990). Rather, "the situs of the injury is the location of the original event which causes the injury, not the location where the resultant damages are subsequently felt by the plaintiff." Id. (citing Carte v. Parkoff, 152 A.D.2d 615, 616, 543 N.Y.S.2d 718, 719 (App. Div. 1989)). *See also* Fantis Foods, Inc. v. Standard Importers, 49 N.Y.2d 317, 326, 425 N.Y.S.2d 783, 787 (Ct. App. 1980)(same).

The only tortious wrongdoing complained of by Unique is that "the rain came in through the roof," Bigelow Aff. in Opp. to

Cross-Motion, ¶ 6 – apparently through some fault of Shelby – and thereby precipitated Kohn's injury. However, these events occurred in North Carolina and no jurisdiction may therefore be conferred through § 302(a)(3).

2. C.P.L.R. § 302(a)(1)

To avail itself of § 302(a)(1), Unique must show, *inter alia*, that (1) the causes of action alleged by it arise from (2) either (i) the transaction of business in New York or (ii) a contract to supply goods or services in New York. C.P.L.R. § 302(a)(1). Once again, Unique has failed to plead or otherwise demonstrate the necessary elements. Specifically, it has failed to allege that the causes of action arose from the transaction of business in New York or any contract to supply goods or services in New York.

3. Discovery

Unique contends that it will be able to properly show jurisdiction under either or both of these provisions if it is allowed to obtain discovery from Shelby. The discovery Unique seeks is, according to an affirmation submitted in partial opposition to Shelby's motion, intended to determine whether Shelby derives "substantial revenue" from business conducted in

New York or in interstate commerce.[3] Bigelow Aff. in Partial Opp., ¶¶ 8-9. Elsewhere, Unique states that

> it is unclear as to the precise nature of the third-party defendant's contacts with New York, or with the transaction at issue as no discovery has been forthcoming as to these issues. What is not in dispute is that plaintiff, pursuant to some contract with an unknown entity was performing services at third-party defendant's premises and upon their property. . . Numerous questions remain over the extent of SHELBY's contacts with New York.

Unique Mem. at 4. As far as the first sort of discovery sought by Unique is concerned – that relating to the establishment of "significant revenue" – even, assuming *arguendo* that Unique could establish the "significant revenue" requirement, that would not suffice to establish jurisdiction under § 302(a)(3). As far as the second sort of discovery sought by Unique is concerned, because it cannot establish that the causes of action asserted against Shelby arose from either the transaction of business in New York or any contract pursuant to which Shelby would supply goods or services in New York[4] the proposed discovery is without

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[3] The discovery sought is apparently related to a requirement set forth in C.P.L.R. § 302(a)(3)(i) and (ii).

[4] Unique does not allege that it entered into any agreement with Shelby in New York.

purpose.

"While discovery on the question of personal jurisdiction is sometimes appropriate when there is a motion to dismiss for lack of jurisdiction, plaintiff[] must first make a threshold showing that there is some basis for the assertion of jurisdiction." Monsanto International Sales Co. v. Hanjin Container Lines, 770 F. Supp. 832, 837-38 (S.D.N.Y. 1991), *modified on other grounds*, 88 Civ. 1673, 1991 WL 210951 (Oct. 8, 1991), *aff'd*, 962 F.2d 4 (2d Cir. 1992)(Table). Here, there has been no such threshold showing.

C. Transfer

28 U.S.C. § 1631 provides that "[w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . ." Transfer of the third party action against Shelby is appropriate here. *See, e.g.*, Longwood Resources Corp. v. C.M. Exploration Co., 988 F. Supp. 750 (S.D.N.Y. 1997)(court transfers rather than dismisses action where jurisdiction is lacking and parties agree that jurisdiction could be exercised by transferee court).

Moreover, it has not cited to any such agreement in its papers.

CONCLUSION

For the foregoing reasons, Shelby's motion to dismiss for lack of personal jurisdiction is granted and the third-party action against it transferred to the United States District Court for the Western District of North Carolina. The principal action is now remanded to state court.

SO ORDERED.

Dated: Brooklyn, New York
July 24, 1998

I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

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